IBRAHIM v. ABDULLAH

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Wee Chong Jin C.J. (Singapore)) November 20, 1963]

[Penang — Federal Court Civil Appeal No. 11 of 1963]

Contract—Sale of Land—Reciprocal contracts of sale and resale in 3 years—Contract for resale not mentioned in litigation to enforce sale—Separate action to enforce resale—Whether party now estopped from relying on second agreement—Specific performance.

Estoppel—Rights—Failure to assert in earlier litigation—Cannot be relied on in subsequent proceedings.

The appellant and the respondent entered into two agreements on June 20, 1956 whereby under the first agreement the appellant purported to sell the land in question for $1,000 to the respondent (the date of completion being agreed at 3 years from the date of the agreement) and the second agreement whereby the respondent agreed to resell the land to the appellant at the same price within a period of 3 years from the date of the agreement. In October 1959 the respondent commenced an action in the High Court against the appellant for specific performance of the first agreement. The appellant in his defence did not disclose the second agreement and the trial Judge found in favour of the respondent and the land was registered in the name of the respondent. In February 1961 the appellant commenced a separate action against the respondent in which he disclosed the existence of both agreements. At this trial the Judge did not accept the appellant's evidence that he was ready and willing to repay the sum of $1,000 and so he gave judgment in favour of the respondent.

The only ground of appeal argued was that the two agreements amounted to an equitable mortgage of the land and that by virtue of the admission in the defence that it was an equitable mortgage the respondent was estopped from contending at the trial that he had purchased the land from the appellant and had given the appellant a right to repurchase the land within 3 years from the date of the two agreements.

Held: (1) the transaction amounted to no more than a contract on the one hand by the appellant to sell the land to the respondent and on the other hand by the respondent to the appellant to resell the land to the appellant if the appellant was able to tender the agreed price of $1,000 within 3 years from June 20, 1956. As the appellant according to the trial Judge had failed to pay or to be able to pay the $1,000 there was no equity in his favour and the Court could not grant specific performance;

(2) on a reading of the defence as a whole it was quite clear that the defence was based on the two agreements and the respondent was not estopped at the trial from relying on both these agreements.

Case referred to:—

(1) *Ord* v. *Ord* [1923] 2 K.B. 432, 439.

FEDERAL COURT.

A. Jayadeva for the appellant.

Lim Kean Chye for the respondent.

Wee Chong Jin C.J. (Singapore) (delivering oral judgment): This case relates to a transaction concerning land in 1956 when the appellant and the respondent entered into two agreements on 20th June, 1956. One agreement purported to sell a piece of "bendang" land in the Mukim of Sala Besar, District of Yen, to the respondent — the date of completion being agreed at three years from the date of the agreement; the consideration for the sale being the sum of $1,000. The second agreement was made in favour of the appellant by the respondent whereby he agreed to resell the land to the appellant at the same price within a period of three years from the date of the agreement.

In October, 1959, that is to say more than three years after these two agreements were entered into, the respondent commenced an action in the High Court at Alor Star against the appellant for specific performance of the first agreement asking the Court to decree specific performance in respect of that agreement, that is to say that the appellant should transfer or execute a transfer of the said land to the respondent by virtue of that agreement.

The appellant in his defence did not disclose the second agreement, but put forward the defence that the land was sold to the respondent by him for a consideration of $4,900 and that under the agreement of sale the respondent had agreed to settle the balance amounting to $3,900 within three years of the execution of this agreement.

In that action the learned trial Judge found in favour of the respondent and specific performance was decreed. The land was then transferred and the title registered in the name of the present respondent.

He has not appealed against that judgment, but many years later, in February, 1961, he commenced an action against the respondent which is now the subject matter of this appeal. In that action he disclosed the existence of both agreements and in his statement of claim alleged or averred that he had offered within the contractual period of three years not to repurchase the land but to repay what he claimed was a loan of $1,000 to the respondent who in turn had failed to retransfer the title to the land back to him. At the trial the learned trial Judge did not accept his evidence that he was able, ready and willing to repay the said sum of $1,000 and gave judgment in favour of the present respondent.

The only ground of appeal which was argued before us yesterday was that by virtue of these two agreements the transaction in 1956 amounted to an equitable mortgage of the land and that by virtue of the admission in the defence that it was an equitable mortgage the respondent is estopped from contending at the trial that he had purchased the land from the appellant and had given the appellant a right to repurchase the land within three years from the date of the two agreements.

It seems to me clear on the authorities which have been cited to us yesterday that the transaction in 1956 amounted to no more than a contract on the one hand by the appellant to sell the land to the respondent and on the other hand

by the respondent to the appellant to resell the land to the appellant if the appellant was also to tender the agreed price of $1,000 within three years from 20th June, 1956. That being my view of the transaction that took place in 1956, there can be no question in my mind that the appellant can to-day in the face of the judgment in 1959 claim that he is entitled to specific performance in so far as the second agreement was concerned, that is to say to have the title to the land retransferred to him on his paying the agreed price of $1,000. He has, so the learned trial Judge in this action has found, failed to pay or to be able to pay $1,000 — the agreed purchase price — to the respondent within the contract period and in my opinion there is no equity in his favour for this Court to allow him after the period of three years to ask for specific performance of that particular contract in his favour.

As regards the ground that the present respondent is estopped by his admission in the pleadings from denying that this is an equitable mortgage it seems to me clear if one reads the defence as a whole that the respondent has quite clearly set out that his defence is based on the two agreements which I have referred to and he is not estopped at the trial from relying on both these agreements.

For these reasons I would dismiss this appeal with costs.

Thomson L.P.: I agree with what my Lord has said.

Such rights as accrued to the parties by reason of the 1956 transaction were, in my view, contractual and personal.

In so far as the appellant's claim was capable of being treated in that way in my view it was rightly rejected by the trial Judge for the reasons he has stated. In any event it was for the appellant to raise estoppel and *res judicata* arising from previous proceedings in Civil Suit No. 126 of 1959.

If the appellant had, or thought he had, any rights of any sort whatsoever by reason of the alleged agreement he could and should have asserted his rights in the previous litigation. In my view he is now estopped. On that I would quote a few words from the judgment of Lush J. in the case of *Ord* v. *Ord.*[1] His Lordship dealt with the general question of *res judicata,* and then went on to say:—

> "There is a wider principle....often treated as covered by the plea of *res judicata,* that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward,"

I also would dismiss the appeal with costs.

Barakbah C.J. (Malaya): I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Jayadeva, Zahir & Izmi*; *Lim Cheng Ean & Co.*

SIM KEE BENG v. BLU

[O.C.J. (McGilligan J.) November 26, 1963]
[Sibu — High Court Civil Suit No. 192 of 1962]

Limitation—Claim for compensation for cutting down trees—Claim based on trespass or trover—Period of limitation—Limitation Ordinance (Sarawak Cap. 49) s. 11, Schedule Items 29, 37.

The plaintiff claimed (it was not clear from the statement of claim whether the action was based on trespass or trover) the sum of $1,428 being cost of compensation for 204 matured sago trees cut and taken away by the defendant, the last cutting of which took place on September 27, 1959. The defendant alleged that the claim was barred by the Limitation Ordinance:

Held: the plaintiff to avoid being barred by the Limitation Ordinance should have started proceedings within 3 years from September 27, 1959 i.e. on or before September 28, 1962 (whether the action be based on trespass or trover) and in this case as his statement of claim was dated December 11, 1962 and the writ of summons issued on December 12, 1962 the action was barred under the said Ordinance.

SUIT.

Plaintiff in person.

S. K. Reddi for the defendant.

McGilligan J.: The Court has now heard the plaintiff's evidence, except that it has not yet finally decided whether or not to admit a statement made by Lukin binti Rajan, deceased, in an earlier case. At any rate, the Court is now in a position to decide (Lukin's statement could not affect this decision) if the plaintiff's claim is barred by the Limitation Ordinance, the defendant having raised the defence of limitation.

In this case the plaintiff claims "$1,428, being cost of compensation for 204 matured sago trees cut and taken away by defendant at $7 per tree", "defendant" means "Lukin binti Rajan", as the legal personal representative of whom the actual defendant, Blu binti Bana, now is party to this case.

It is clear that the claim is in respect of the alleged wrongful cutting down and taking away of trees on the plaintiff's land. But it is not at all clear, either from the statement of claim, or from the plaintiff's evidence, whether the claim is for trespass to land, or is in trover for the value of the trees severed from the land in their character as chattels.

The Court therefore proposes to consider the question of limitation of action; first, treating it as one in trespass, and, second, treating it as one in trover.